IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONGREGATION KOL AMI and RABBI ELLIOT HOLIN, Plaintiffs,	:	CIVIL ACTION
v.	:	
ABINGTON TOWNSHIP; BOARD OF COMMISSIONERS OF ABINGTON TOWNSHIP; THE ZONING HEARING BOARD OF ABINGTON TOWNSHIP; and LAWRENCE T. MATTEO, JR., Defendants.	:	NO. 01-1919

Opinion and Order

Newcomer, S.J. August , 2004

This is a religious rights case. The action is premised on violations of the Federal and Pennsylvania constitutions, the Pennsylvania Religious Freedom Restoration Act ("Pa-RFRA"), and 42 U.S.C. 2000cc, et seq., which is commonly referred to as the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The dispute arises out of the Defendants' zoning action, which prevents the Plaintiffs from using the property located at 1908 Robert Road, Abington Township, as a Synagogue.

Currently before the Court are: the Defendants' Motion for Summary Judgment; the Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, as to Count XIV of the Plaintiffs' Complaint; and the Plaintiffs' Renewed Motion for Summary Judgment on their equal protection and due process

claims. For the following reasons, the Defendants' Motion for Summary Judgment will be denied in part and granted in part; the Defendants' Motion to Dismiss or in the Alternative for Summary Judgment, as to Count XIV of the Plaintiffs' Complaint, will be granted; and the Plaintiffs' Motion will be denied.

I. Facts

Plaintiff Congregation Kol Ami (the "Plaintiff") is a Reform Jewish Synagogue, operating since 1994 as a Pennsylvania non-profit corporation in the Philadelphia area. It conducts religious services, Hebrew classes, and other related activities at various locations in eastern Montgomery County. Plaintiff Elliot Holin is the Rabbi of Congregation Kol Ami.

Defendant Abington Township (the "Township") is a First Class township in Pennsylvania that is empowered to act through its governing body, officials, and employees. The Township has the power to regulate and restrict the use of land and structures within its borders pursuant to the First Class Township Code of Pennsylvania, 53 P.S. § 55101 *et seq*. With respect to zoning, subdivision, and land use matters, the Township derives its power from the Pennsylvania Municipalities Planning Code, 53 P.S. § 10101 *et seq*. Defendant Board of Commissioners (the "Board") is the duly elected executive body of the Township.

The Zoning Hearing Board of Abington Township (the

"ZHB") is a separate entity from the Township whose members are elected by the Board. The ZHB's primary function is to hear and render final adjudication on: 1) appeals concerning the zoning ordinance at issue - the May 9, 1996 Revised Abington Township Zoning Ordinance (the "Ordinance"); 2) special exceptions to the Ordinance; and 3) variances from the terms of the Ordinance. The Township does not normally appear before the ZHB to state a position on an application, although it is not foreclosed from doing so.

A. History of the Relevant Zoning Ordinance

In 1978 the Township enacted Ordinance No. 1469 (the "1978 Ordinance"), which established a V-Residence Zoning District, as part of a Comprehensive Plan for development within the Township. Article III, § 301. This V-Residence district permitted several land uses by right: single-family detached dwellings, tilling of soil, township administrative buildings, public libraries, parks, and play or recreational areas. Defendants' Exhibit G, pg. 26. Those seeking to use this area for religious institutions such as churches, rectories, parish houses, convents, monasteries, etc., could petition the ZHB for a special exception. Id.

On March 8, 1990, the Township enacted Ordinance No. 1676, which amended § 301.2 of the 1978 Ordinance to eliminate all uses except single-family detached dwellings and those

accessory uses that are customarily incidental to such dwellings. Defendants' Exhibit H. All uses previously permitted by special exemption, including "religious uses," were eliminated. Id.

On May 9, 1996 the Township again modified its Comprehensive plan to respond to perceived changes in the community's pattern of growth and change. This 1996 Ordinance, *inter alia*, changed the zoning designation of the Township's low density residential district from V-Residence to R-1 Residential. R-1 districts permit the following uses by right: agriculture, livestock, single-family detached dwellings, conservation, and recreation preserves. The Ordinance also permitted the following uses by special exception: kennels, riding academies, municipal complexes, outdoor recreation, emergency services, and utility facilities. Defendants' Exhibit J, 19. As defined by Article VII, section 706 (G)(6) of the Ordinance, "outdoor recreation" includes "public or private miniature golf courses, swimming pools, ball courts, tennis courses, ball fields, trials, and similar uses...[o]utdoor recreation shall [also] include any accessory use[s], such as snack bar[s], pro shops, club houses, [and] country clubs." Id. at 116.

Churches and other religious institutions looking to relocate to a R-1 Residential District must apply for a variance with the ZHB. While religious institutions are not explicitly excluded from R-1 districts by the language of the Ordinance,

they are *de jure* excluded because they are not specifically listed among the uses that may apply for special exception. The variance standard is much different from the special exception standard, with the most notable difference being that the variance standard requires the applicant to demonstrate unnecessary hardship.

To demonstrate unnecessary hardship, the applicant must show that: "(1) the physical features of the property are such that it cannot be used for a permitted purpose; or (2) that the property can be conformed for a permitted use only at a prohibitive expense; or (3) that the property has no value for any purpose permitted by the zoning ordinance." Hertzberg v. Zoning Bd. of Adjustment, 721 A.2d 43, 47 (Pa. 1998). This burden stands in contrast to the onus placed on an applicant seeking a special exception, where an applicant need only establish that the zoning ordinance allows the use, and that the particular use applied for is consistent with the public interest. If that showing is made, the special exception must be granted, though appropriate conditions may be attached by the ZHB.

Religious institutions are permitted, by right, to locate in areas designated by the Ordinance as either CS-Community Service Districts or M-Mixed Use Districts, and by special exception in A-O Apartment/Office Districts. These

public sector districts were specifically designed to accommodate the religious needs, *inter alia*, of the Township community. Defendants' Exhibit J at pgs. 37, 43, 47. Twenty-nine of the thirty-six churches and synagogues currently operating in the Township existed prior to the Ordinance, and are legal, nonconforming uses outside of the CS, M, and A-O Districts. Twenty-five of those places of worship are located in residential districts.

B. History of the Property At Issue

The property in question, located at 1908 Robert Road, is zoned R-1 Residential and consists of several buildings situated on a 10.9 acre parcel of land. In 1951, the property was purchased by the Sisters of Nazareth, an Order of Roman Catholic Nuns. The property was used as a convent and was capable of housing over eighty Sisters. While owned by the Sisters, there were few, if any, visitors to the property, which for all intents and purposes was the equivalent of a residence. In 1995, the Sisters leased the property to a community of Greek Orthodox Monks for religious services, family retreats, religious study, and prayer. To conform to the 1990 amendments, the Monks filed an application with the ZHB seeking a variance from the Ordinance to use the property as a monastery. The ZHB granted this request, but required that the property deed be restricted to prevent further subdivision, and that a driveway be

constructed off of Robert Road. This driveway is currently the only means of ingress or egress for the property. The street from which the driveway extends ends in a cul-de-sac and the surrounding area is completely residential.

C. History of the Current Litigation

In August 1999, the Plaintiffs entered into an agreement with the Sisters to purchase the property for use as a place of worship. By January 2000, the Plaintiffs filed an application with the ZHB seeking either a variance, a special exception, or permission to use the property as an existing non-conforming use. At that time, the Plaintiffs also petitioned for the right to use the property for *Shabbat* services on alternate Fridays and Saturdays, Hebrew classes on Wednesdays, and religious classes for two hours on Sunday mornings. Other proposed uses would include four High Holy Day services in the fall, religious meetings, *Bar* and *Bat Mitzvah* services, outdoor wedding ceremonies, and other similar celebrations and receptions. The Plaintiffs also planned to expand the existing parking from twenty spaces to at least one hundred and thirty seven spaces.

On March 20, 2001, the ZHB issued an Opinion and Order denying Plaintiffs' requests, finding that the proposed use of the property differed from the Sisters' use and would cause more traffic, noise, and other neighborhood disruptions. The ZHB

further concluded that the Plaintiffs had failed to show that they were entitled to a variance because there were no unique physical features of the property that would preclude it from being used as zoned, and that the Plaintiffs failed to demonstrate unnecessary hardship.

II. Outline of the Plaintiffs' Claims

Rather than pursuing an appeal with the Court of Common Pleas of Montgomery County, the Plaintiffs filed the present lawsuit seeking injunctive, declaratory, and compensatory relief. In their Amended Complaint, the Plaintiffs allege fourteen counts. Under the U.S. Constitution, the Plaintiffs allege claims for: (1) violation of the right to free exercise of religion under the First and Fourteenth Amendments, (2)violation of the right to freedom of speech under the First and Fourteenth Amendments, (3) violation of the right to freedom of assembly under the First and Fourteenth Amendments, (4) violation of the Equal Protection Clause of the Fourteenth Amendment, and (5) violation of the Due Process Clause of the Fourteenth Amendment.

Under the Pennsylvania Constitution, the Plaintiffs allege claims for: (1) violation of the right to freedom of conscience under Article I, Section 3, (2) violation of the right to freedom of speech under Section 7, (3) violation of the right to freedom of assembly under Article I, Section 20, and (4)

violation of the right to equal protection under Article I, Section 26.

The Plaintiffs further allege: (1) violations of the RLUIPA, 42 U.S.C. §§ 2000cc (b)(1) and (2), claiming that the Defendants discriminated on the basis of religion and treated Plaintiffs on less than equal terms with non-religious institutions; (2) violation of the RLUIPA, 42 U.S.C.§ 2000cc (a), claiming that the Defendants imposed a substantial burden on the Plaintiffs' free exercise of religion; (3) violation of the RLUIPA, 42 U.S.C. § 2000cc b(3)(B), claiming that the Defendants unreasonably limited religious assemblies in the Township; (4) violation of the Municipalities Planning Code, 53 P.S. §§ 11001A-11005A, claiming that the Defendants' March 20, 2001 decision was arbitrary, capricious, not supported by substantial evidence, and legally erroneous; (5) violation of the Pennsylvania Religious Freedom Restoration Act (Pa-RFRA), claiming that the Defendants substantially burdened Plaintiffs' right to free exercise of religion.

The Plaintiffs moved for partial summary judgment on their claim that the Ordinance is unreasonable on its face because it prohibits houses of worship from locating in residential neighborhoods. Relying on the Supreme Court's decision in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), this Court held that the Ordinance, as applied,

violated the Equal Protection Clause of the United States Constitution. Specifically, this Court reasoned that the Township had no rational reason to allow some uses by special exception but not the Plaintiffs'. Congregation Kol Ami v. Abington Township, 161 F.Supp.2d 432, 437 (E.D. Pa 2001). In addition, the Court found that the Township's traffic, noise, and light concerns existed for other entities which were allowed to request special exceptions. Thus, this Court concluded that the means employed by the Ordinance, i.e., distinguishing between country clubs, for example, and the Plaintiffs' use, were not rationally related to the goal of preventing traffic, noise and light pollution in the neighborhood. See id. at 437. Summary judgment was granted in favor of the Plaintiffs, and the ZHB was ordered to conduct hearings on the Plaintiffs' application for a special exception. Id. The Township moved for reconsideration and was denied.

The Township appealed to the Court of Appeals for the Third Circuit and asked for a stay of the injunction. Although the Court of Appeals did not grant the initial request for a stay, that Court ultimately found in favor of the Township and reversed. At oral argument, the Township argued that this Court erred in its equal protection analysis, and the Court of Appeals agreed. The case was remanded to this Court for determination of lingering factual issues regarding the equal protection claim and

the other claims at issue. The instant motions followed. The Court will now discuss those motions.

III. Free Exercise of Religion

A. Plaintiffs' First Amendment Rights Were Not Violated under Pre-RFRA and Pre-RLUIPA Jurisprudence

The Plaintiffs argue that strict scrutiny should be applied to the Ordinance and to the denial of the variance by the ZHB because the Ordinance, on its face and as applied, infringes on their right to freely exercise their religion. The Court concludes that the burden placed on religion, however, is not sufficient to raise a free exercise violation under our First Amendment jurisprudence before the adoption of the RLUIPA.[1]

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof.*" U.S. Const. Amend. I (emphasis added). Because the Amendment only forbids the making of laws which "prohibit" free exercise, it is a basic precept of free exercise jurisprudence that not every governmental act that effects religion violates the First Amendment. The First

[1]As will be explained *infra,* there is a marked break in the case law between pre- and post-RLUIPA cases. Read without recognizing the deviation brought about by the RLUIPA, as both parties would have us do, the cases appear to be hopelessly contradictory. Viewed in the light that the RLUIPA effectively changed the type of burdens that require judicial intervention, it appears that there are two types of "burdens" on the exercise of religion: Those defined by free exercise case law both prior to and during the effectiveness of the RFRA, and those that have been recognized since the passage of the RLUIPA.

Amendment is only offended if there is a substantial burden on religious exercise.

In deciding what burdens amount to a prohibition of free exercise, the nature and centrality of the religious activity is a major consideration. See Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 384-85 (1990) ("Our cases have established that 'the free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.'")(quoting Hernandez v. Commissioner, 490 U.S. 680, 699 (1989)); Lakewood, Ohio Cong. of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 306 (1983)(stating that "nature of the observance at stake must be evaluated").[2] Free exercise is substantially burdened, in a First Amendment context, when the government coerces a person not to engage in activity that is warranted by a fundamental tenet of his religious beliefs, Wisconsin v. Yoder, 406 U.S. 205 (1972); or, when following the basic tenets of your religious beliefs forces you to forfeit your right to needed government benefits. Sherbert v. Verner, 374 U.S. 398, 404 (1963). See also Goodall By Goodall v. Stafford County School

[2]In determining whether a specific religious exercise is central to a plaintiff's belief system, the court must be careful not to question what is asserted by the plaintiff. See DeHart v. Horn, 227 F.3d 47, 50 (3d Cir. 2000)(restating that it is not for a court to determine if a religious belief is doctrinally correct).

Board, 60 F.3d 168, 172-3 (4th Cir. 1995)(finding no substantial burden when the plaintiffs were "neither compelled . . . to engage in conduct proscribed by their religious beliefs, nor . . . forced to abstain from any action which their religion mandates that they take").

Cases decided before the passage of the RFRA found no violation of the Free Exercise Clause when the burden imposed on religion was merely incidental, economic, or aesthetic. See Lakewood, 699 F.2d at 307. In Braunfield v. Brown, 366 U.S. 599 (1961), the Supreme Court found that a government regulation that made practicing one's religion more expensive does not affect religious freedom. The case involved a challenge to Pennsylvania's Sunday Closing law, which when combined with the plaintiff's religious obligation to refrain from Saturday work imposed a financial hardship. Id. There was no free exercise issue, however, because although the law made practicing one's religion more difficult by increasing the financial hardship, it did not interfere with or impede a religious observation. Id. at 605. In Lakewood, the Sixth Circuit rejected a free exercise challenge against a zoning ordinance that prohibited churches from locating in residential areas. That ordinance required the church to either build in the ten percent of the City not zoned residential, or to purchase an existing church. Id. at 307. The court found that the City's imposition on the church's financial

and aesthetic interests, including its desire to build in a residential area, did not amount to an infringement on the church's freedom of religion rights. Similarly, the Tenth Circuit held in Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 821-23 (10th Cir. 1988), that restricting a church from building in a particular area that had no ritualistic significance posed only an indirect burden on free exercise and was not significant enough to amount to a constitutional violation. Id. at 824-25. In St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), the Second Circuit held that the denial of a certificate of appropriateness, needed by the church to build a large office tower to further its charitable and ministerial programs, did not offend the Free Exercise Clause. The court found no unconstitutional burden because the church was not prevented from following its beliefs despite the fact that the church's ability to raise revenue to carry out its programs might be limited.

Under the substantial burden analysis of the RFRA, courts continued to hold that indirect, financial, and aesthetic burdens did not warrant judicial intervention.[3] The court in

[3]Although the RFRA was eventually found unconstitutional for impermissibly expanding free exercise rights, the law did not attempt to change the definition of what constituted a substantial burden on free exercise. Compare the RFRA (Pub. L. 103-141 §5(4), Nov. 16, 1993)("(4) the term 'exercise of religion' means the exercise of religion under the First Amendment to the Constitution") with the RLUIPA (Pub. L. 106-274, § 8, Sept. 22, 2000)("(7) Religious exercise.----

(A) In general.--The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious

International Church of the Foursquare Gospel v. City of Chicago Heights, 955 F.Supp. 878 (N.D. Ill. 1996), found that the city's denial of a special use permit to allow a church to re-develop an old department store was not a substantial burden under the RFRA. Following pre-RFRA case law, the court stated that the denial "does not impose a forfeiture of a benefit or a penalty because of religious belief." Id. at 880. Rather, the burden was merely based on location. Id. The city was "not restricting [the church's] location to some obscure corner or requiring that it be located in the most highly-priced part of the community, or insisting that it rehabilitate some substandard land at excessive cost." Id. In Daytona Rescue Mission, Inc. v. City of Daytona, 885 F.Supp. 1554 (M.D. Fla. 1995), the Middle District of Florida concluded that a city zoning ordinance requiring that a religious organization seek semi-public use status to open a homeless shelter on a property it had contracted to purchase was not a substantial burden under the Free Exercise Clause and the RFRA. Even accepting that clothing and feeding the homeless was central to the mission's religion, the court found that "the burden on religion is at the lower end of the spectrum." Id. at 1558. The court reasoned that the zoning ordinance did not prevent the

---

belief.
(B) Rule.--The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.")

mission from operating the shelter elsewhere in the city, as evidenced by the fact that there were other shelters and that the mission had sought an application for only one property. Id. at 1559-60. Similarly, this Court has held that a plaintiff church, which challenged a parking space requirement, "utterly failed to show that anyone's freedom of religion was affected, let alone 'substantially burden[ed].'"[4] Germantown Seventh Day Adventist Church v. City of Philadelphia, 1994 U.S. Dist. LEXIS 12163, at * 5 (E. D. Pa. filed August 26, 1994).

Considering this pre-RLUIPA case law defining free exercise burdens, it is clear that the prohibition against developing the property at 1908 Robert Road or in locating a new synagogue in other residential areas of the Township does not meet the applicable substantial burdens test. It is undisputed that the government regulation does not restrict the Plaintiffs' beliefs, but only thier conduct. The regulation prevents them from developing and using the property at 1908 Robert Road as a

[4]The Plaintiffs cite to St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), Stuart Circle Parish v. Bd. of Zoning Appeals of the City of Richmond, 946 F. Supp. 1225, 1236 (E.D. Va. 1996), and Western Presbyterian Church v. Bd. of Zoning Adjustment of the District of Columbia, 862 F. Supp. 538, 544-46 (D.D.C. 1994), as cases that find a substantial burden under the RFRA and the Free Exercise clause. These cases all involve zoning restrictions that prevented a church from housing and/or feeding homeless people at its already-operating house of worship. The obvious distinction between these cases and the instant case is that these churches were already operating at a given location, and the government was then trying to regulate the type of religious exercise that may take place. "Once the zoning authorities of a city permit the construction of a church in a particular locality, the city must refrain, absent exceptional circumstances, from in any way regulating what religious functions the church may conduct." Western Presbyterian, 862 F. Supp. 538, 546 (D.D.C. 1994).

synagogue and from developing any other property not currently being used as a house of worship located in residential zones. The Plaintiffs, however, do not claim that locating their house of worship in a residential area is a basic tenet of their faith. While Rabbi Holin states that his synagogue teaches its members "the importance of involvement and service to the community," he does not aver that it mandates that worship services take place next to houses. The Ordinance does not prevent Congregation members from getting involved in their community. Community service events may be hosted at members' homes or at other facilities permitted in residential neighborhoods. While this will undoubtedly be more difficult, inconvenient, and expensive than simply sponsoring community involvement from the Synagogue itself, it is not the type of burden recognized by the First Amendment.

The Plaintiffs' assertion that locations in the other three zoning areas where houses of worship are permitted "are unsuitable for Plaintiff's religious purposes" does not change this analysis. The First Amendment does not guarantee a perfect fit between available land and proposed religious purposes. See Love Church v. City of Evanston, 896 F.2d 1082, 1086 (7th Cir. 1990)("the harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them."). The Plaintiffs have not shown that any law, ordinance,

or regulation would prevent it from engaging in its proposed institutional uses in these available zones. The Court must conclude that the burden imposed on the Plaintiffs does not prevent conduct mandated by a central tenet of its religion, and that it is only an indirect financial and aesthetic burden. Thus, the Plaintiffs' claim under the First Amendment's Free Exercise Clause cannot survive.

B. Defendants Are Not Entitled to Summary Judgment on Plaintiffs' Claim under Article I, Section 3 of the Pennsylvania Constitution

The Defendants choose to attack the Plaintiffs' claim for violation of the Pennsylvania Constitution's guarantee of the right to freedom of conscience found in Article I, Section 3 of the Pennsylvania Constitution on solely procedural grounds. They argue that the claim should be dismissed because the Plaintiffs failed to include, in their complaint, a discussion of the four factors relevant to deciding whether there is a claim under the Pennsylvania Constitution. To properly bring a claim under the Commonwealth's constitution, a party must "brief and analyze at least the following four factors: (1) [the] text of the Pennsylvania constitutional provision; (2) [the] history of the provision, including Pennsylvania case-law; (3) related case-law from other states; [and] (4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence." Commonwealth v.

Edmunds, 526 Pa. 374, 586 A.2d 887 (Pa. 1991). While some Courts have dismissed cases in the absence of any discussion of these factors, the Pennsylvania Supreme Court has made clear that the analysis is not mandatory, and that a party's claim should not be dismissed for failing to follow the precise format set forth in Edmunds. Commonwealth v. White, 543 Pa. 45, 50 (1995); Commonwealth v. Swinehart, 541 Pa. 500, 509 (1995); See also Commonwealth v. Crouse, 729 A.2d 588, 594 (Pa. Super. Ct. 1999).

The flaw of the Defendants' argument is not in exaggerating the importance of the factors cited above, but rather in their attempt to transform these factors into a requirement at the pleading stage. Such a stringent pleading requirement would be incompatible with the principles of notice pleading as required by the Federal Rules of Civil Procedure. Moreover, the clear language from the cases cited to the Court instructs the parties to "brief and analyze" these factors. The Complaint is not the proper document in which to "brief and analyze." While the Defendants were right to raise these factors in a dispositive Motion, they should have used their briefing efforts to discuss why those factors should compel a judgment in their favor, rather than using them as a procedural technicality.

The Plaintiffs ultimately briefed these four factors in their response, and the Defendants offered no further opposition in their reply brief. This Court is not in the position to

formulate arguments to dismiss the Plaintiffs' claims. Accordingly, the Court will deny the Defendants' Motion for Summary Judgment as to this Count.

V. The RLUIPA

A. The RLUIPA Applies to this Case

The Court must next decide whether the §(a)(1) of RLUIPA applies to the instant case.[5] Despite the fact that there is no substantial burden as defined by pre-RLUIPA case law, the Court holds that the RLUIPA imposes a broad test for determining what is a substantial burden. Both the textual changes made by Congress to the definition of free exercise of religion (with the adoption of the RLUIPA), and the case law, support this Court's finding that the Plaintiffs are facing a "substantial burden" in this case.

In passing the RLUIPA, Congress changed the definition of a substantial burden on free exercise from what it had been under the RFRA. As cited in the margin, note 4 *supra,* the RFRA

[5]Section a(1), which states the General Rule of the RLUIPA, provides:

(a) Substantial burdens.
(1) General rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--
(A) is in furtherance of a compelling governmental interest; and
(B) is the least restrictive means of furthering that compelling governmental interest.

left the Courts to apply the definition of free exercise as it existed under precedent. Therefore, the courts continued to apply the same threshold requirements to RFRA challenges as they had to free exercise challenges. This scenario led to many cases being dismissed without the application of strict scrutiny because courts found that the burden on free exercise was merely incidental and not sufficient to fall within the ambit of "free exercise."[6] When the RLUIPA was adopted, Congress amended the definition section to provide:

> (7) Religious exercise.----
>
> (A) In general.--The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.
>
> (B) Rule.--The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose. Pub. L. 106-274, § 8, Sept. 22, 2000.

Section 7(A) lessened the emphasis courts should place on the

[6]Footnote four of the Defendants' brief in Support of the Motion for Summary Judgment lists forty cases, each of which holding that government conduct was not a substantial burden on free exercise under the RFRA. Commentators have identified court applications of the substantial burden test as a significant reason for the inability of the RFRA to achieve its desired effect. Ira C. Lupu, The Failure of the RFRA, 20 U. ARK Little Rock L.J. 575 (1998).

nature and centrality of the exercise that is being burdened. Subsection (B) undermines the relevance of holdings in cases like Lakewood, Messiah Baptist Church, Germantown Seventh Day Adventist Church, and International Church of the Foursquare Gospel. Those cases held that all-out prohibitions against the development of a particular piece of real property into a place of worship do not violate the First Amendment or the RFRA. It is doubtful that those cases would have been decided the same under the above cited definition of religious exercise. Under the RLUIPA, the development of these properties would have been deemed "religious exercise." This exercise was substantially burdened, and in fact prohibited by, the challenged government action.

The Plaintiffs cite to several cases decided under the RLUIPA that have found that preventing a church from developing a particular property is in fact a substantial burden on free exercise. In Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F.Supp.2d 1203 (C.D.Cal. 2002), the Central District of California, citing to subsection (B) *supra*, found that a denial of a permit to build a church when the church's current location was too small to accommodate its growing membership was a substantial burden under the RLUIPA. In Dilaura v. Ann Arbor Charter Township, relying on both parts of section (7) *supra*, the Sixth Circuit held that the denial of a

variance seeking to use a donated house for a religious retreat was a substantial burden under the RLUIPA, but not a violation of the Free Exercise Clause. The Court found that "gatherings of individuals for the purposes of prayer. . . is a use of land constituting a religious exercise that is substantially burdened, under the RLUIPA, by a zoning ordinance that prevents such gatherings." Dilaura v. Ann Arbor Charter Township, No. 00-1846, 2002 U.S. App. LEXIS 3135, at *20 (6th Cir. 2002); See also Murphy v. Zoning Commission of the Town of New Milford, 148 F. Supp. 2d 173 (D.Conn. 2001)(holding that denial of a special use permit to hold group prayer meeting on a residentially zoned property was a substantial burden under the RLUIPA).

Evaluating the instant case with the understanding that the RLUIPA changed the standard for the type of burdens on free exercise that are actionable, and under the case law applying this definition, it is clear that the Ordinance and the denial of a variance to the Plaintiffs are substantial burdens on their free exercise rights. This case is precisely the type of case contemplated by the drafters in their definition of free exercise under the RLUIPA. Under the statute, developing and operating a place of worship at 1908 Robert Road *is* free exercise. There can be no reasonable dispute that the Ordinance and the denial of the variance, which have effectively prevented the Plaintiffs from engaging in this "free exercise," create a substantial burden

within the meaning of the Act.

B. The RLUIPA Is Constitutional

Now that it has been concluded that the RLUIPA applies to the instant case, the next question this Court must decide is whether the RLUIPA is constitutional. The Plaintiffs argue that the RLUIPA is constitutional under 42 U.S.C. § 2000cc(a)(2)(B) or (C). These sections provide that:

> **Scope of application**. This subsection applies in any case in which--
> (A) . . .
> (B)the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
> (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

Section (a)(2)(B) justifies the RLUIPA's application because it is within Congress's authority under the Commerce Clause. Section (a)(2)(C) purports to allow the application of the RLUIPA through the Enforcement Clause of the Fourteenth Amendment. The Court finds that RLUIPA is constitutionally permissible under both.

1. The RLUIPA Is a Valid Exercise of Congressional Authority under Section V of the Fourteenth Amendment

The Plaintiffs and Intervenor argue that *as applied* to this case, pursuant to section (a)(2)(C), the RLUIPA is merely a

codification of existing Supreme Court precedents that put in place a system of individualized exemptions. While case law does support individualized exemptions, the RLUIPA expands upon the case law because, as discussed at length *supra*, it applies to cases where the burdens on free exercise are less than those that were previously actionable. Accordingly, the application of RLUIPA Section (a)(1) to this case is an expansion of the Plaintiffs' rights under the First Amendment. Nonetheless, it is proper remedial legislation within Congress's power under the Fourteenth Amendment.

Congress may enact laws that expand the rights of individuals under the enforcement power of the Fourteenth Amendment. Congress is not limited to mere legislative repetition of judicially defined constitutional rights; it may also prohibit some conduct that is constitutional. Bd. of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 365 (2001)(citing Kimel v. Florida Board of Regents, 528 U.S. 62, 81 (2000)). The RLUIPA may constitutionally apply if Congress has merely set out to remedy violations of constitutional rights, rather than to define substantive rights under the Amendment. Freedom Baptist Church of Del. v. Twp. of Middletown, 204 F. Supp. 2d 857, 872 (E.D. Pa. 2002)(discussing Boerne v. Flores, 521 U.S. 507 (1997)). In making this determination, a Court must be mindful that "the line between measures that remedy or prevent

unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies." Boerne, 521 U.S. at 519-20. To qualify as remedial legislation, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Id. at 520. In Boerne, the Supreme Court rejected the RLUIPA's predecessor - the RFRA - as not being sufficiently proportional and congruent to fall within the enforcement power; accordingly, the Court shall starts its proportionality and congruence analysis by comparing the two acts.

Unlike the RFRA, the RLUIPA does not have "[s]weeping coverage ensur[ing] its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." Boerne, 521 U.S. at 532. The RLUIPA applies only to a very limited subject matter. The RFRA, on the other hand, sought to make laws in nearly every conceivable arena - from family law to criminal law to wildlife protection - justify burdens on religion by satisfying strict scrutiny. See, e.g., U.S. v. Hugs, 109 F.3d 1375 (9th 1997)(applying the RFRA to the Bald and Golden Eagle Protection Act). In stark contrast, the RLUIPA applies only to land use and regulations affecting institutionalized persons.

The RFRA, because its stated goal was to effectively

overrule Smith, precipitated a change in the level of scrutiny in the majority of cases to which it would apply. The RLUIPA only applies, under Section 2(a)(C), when a land use decision turns on issues of individualized exemptions, which opens the door for local land use bodies to cloak religious hostility under a veil of discretion. See Bowen v. Roy, 476 U.S. 693, 708 (1986)("If a state creates such a mechanism [for exemptions], its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent."); Fraternal Order of Police, 170 F.3d 359, 365 (3d Cir. 1997) (finding that refusal of religious exemptions is suggestive of discriminatory intent). Rather than change the constitutional standard, the RLUIPA, in almost all of its applications, will only reinforce the level of scrutiny applicable to systems of individualized exemptions. See Hale O Kaula Church v. Maui Planning Com'n, 229 F. Supp. 2d 1056, 1073 (D. Hawaii 2002)(finding that RLUIPA codifies existing Supreme Court precedent on individualized exemptions and that "[r]egardless of RLUIPA,. . . the substantive test before the court is strict scrutiny"); Freedom Baptist Church, 204 F. Supp. 2d at 873 (stating that the RLUIPA is not hostile to Smith, but rather uses the same analysis in drawing a distinction between neutral laws of general applicability and systems of individualized exemptions).

The RLUIPA also differs from the RFRA in the

legislative findings supporting its passage. The RFRA's legislative findings lacked any showing of modern laws of general applicability which passed for reasons of religious bigotry. Boerne 521 U.S. at 530. In contrast, the RLUIPA's record is replete with zoning actions, in the form of individualized decisions, which adversely affect religious institutions. Restrictive zoning is a relatively modern invention, and based upon the record presented to Congress, its use to burden religious minorities is likely to increase. See *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before subcommittee on the Constitution of the House Committee on the Judiciary*, 105th Cong., 2d Sess., at 405, 415-16(discussing Gallup Poll showing hostile attitudes to religious minorities).

The RLUIPA is sufficiently congruent and proportional to fall under Section V of the Fourteenth Amendment. First, the RLUIPA will only apply to a small number of additional zoning actions that are constitutional under the First Amendment because the burden placed on religion was not substantial under pre-existing jurisprudence. This wider berth of substantial burdens will help both legislatures and Courts by simplifying limitations on the authority of zoning commissions and by eliminating any need to determine whether a particular activity is mandated by religion. This slight expansion of rights is warranted based on a review of the congressional record, which documents a history

of the use of individualized assessments in zoning to violate the rights of religious practitioners, especially those of religious minorities.[7] Unlike the RFRA, which drove a substantive change in the constitutional standard, the RLUIPA clarifies the definition of an already-accepted individualized assessment doctrine and reinforces its application. This is the type of remedial legislation allowed by the Fourteenth Amendment.

2. The RLUIPA Is a Valid Exercise of Congressional Authority under the Commerce Clause

The RLUIPA is also constitutional as applied to the instant case because it falls within Congress's commerce power. Congress may legislate under this power in any one of the following three categories: 1) "the use of the channels of interstate commerce," 2) "the instrumentalities of interstate commerce," and 3) "activities having a substantial relation to interstate commerce." U.S. v. Lopez, 514 U.S. 549, 558-59

[7] The congressional record (146 Cong. Rec. S7774) supports the notion that zoning laws are often enacted and enforced out of hostility to religion. This discriminatory application of zoning laws is common because of the discretionary nature of the laws. Congress's findings were backed by statistical and anecdotal evidence, which was paired with testimony by expert witnesses who affirmed that the anecdotes were representative of the frequent discriminatory application of zoning laws. Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. Davis L.Rev. 755, 770 (1999). There exists a vast array of cases in which courts have echoed these congressional findings. See, e.g., Family Christian Fellowship v. County of Winnebago, 503 N.E.2d 367 (Ill. App. 1986) (city's refusal to permit church use of existing buildings was arbitrary and capricious); Islamic Center of Mississippi, Inc. v. City of Starkville, 840 F.2d 293 (5th Cir. 1988)(city denied a Muslim organization a special use permit three times while granting such permits to every Christian church that had applied); Marks v. City of Chesapeake, 883 F.2d 308, 309-10 (4th Cir. 1989)(city, acting "arbitrarily and capriciously," refused to grant a use permit because neighbors disapproved of the religious practices of the applicant).

(1995). The RLUIPA, while regulating neither the channels nor the instrumentalities of interstate commerce, comes within the ambit of congressional power because it regulates activity that has a substantial relation to interstate commerce. When determining whether a statute properly regulates activity with a substantial effect on interstate commerce, the Supreme Court has looked to the following three factors: 1) whether Congress has given the statute a jurisdictional element, 2) whether the activity is economic or non-economic in nature, and 3) whether the legislative history of the statute contains congressional findings as to the activity's effect on interstate commerce. U.S. v. Morrison, 529 U.S. 598, 610-613 (2000).

The RLUIPA, by use of its jurisdictional element, is limited in application to those cases in which "the substantial burden would affect [interstate] commerce. . . ." 42 U.S.C. 2000cc(a)(2)(B). By use of this restriction, Congress has ensured through a case-by-case inquiry that the substantial burdens placed upon religious landowners actually have an effect on interstate commerce. Congress has consistently used such jurisdictional elements in the context of criminal law, and the courts have routinely affirmed the constitutionality of statutes utilizing such elements. U.S. v. Bishop, 66 F.3d 569 (3d Cir. 1995)(affirming carjacking statute, 18 U.S.C. § 2119 (2004)); U.S. v. Gateward, 84 F.3d 670 (3d Cir. 1996)(affirming felon-in-

possession statute, 18 U.S.C. § 922(g) (2004)); U.S. v. Pearson, 159 F.3d 480 (10th Cir. 1998)(affirming Hobbs Act, 18 U.S.C. § 1951 (2004)).

The Defendants point out that use of a jurisdictional element does not automatically end our commerce clause inquiry because in order to insulate a regulation from scrutiny, the jurisdictional element must have the requisite nexus with interstate commerce. Bishop, 66 F.3d at 585. In other words, the "jurisdictional hook may [not] be so attenuated as to fail to guarantee that the activity regulated has a substantial effect on interstate commerce." U.S. v. Rodia, 194 F.3d 465, 472 (3d Cir. 1999)(citations omitted). When a court concludes that the jurisdictional element is too attenuated, it must look to the other factors outlined in Morrison to determine whether a regulation is within congressional authority. Id.; See U.S. v. Jones, 178 F.3d 481 (7th Cir. 1999)(finding that simply meeting the jurisdictional hook would be too small an effect on commerce to satisfy the Commerce Clause).

The jurisdictional element in this case, however, is sufficient to satisfy the Commerce Clause. The object of the RLUIPA is to minimize burdens that prevent religious institutions from using property for religious exercise. These burdens will often, as in this case, prevent an institution from renovating and improving property. This may affect interstate commerce by

impacting the use of materials, contractors, and planners that move or work in interstate commerce. The land use laws affected by the RLUIPA have a very close nexus, rather than an attenuated connection, with these commercial activities.[8] Accordingly, under its Commerce Clause power, Congress may regulate substantial burdens that fall under RLUIPA section a(2)(B).

3. The RLUIPA does not violate the Establishment Clause[9]

The Defendants argue that the RLUIPA is unconstitutional on its face because it violates the First Amendment's prohibition against laws "respecting an establishment of religion." In support of their argument, the Defendants claim

[8]The Court pauses to note that the only issue it decides today is that the jurisdictional element of the RLUIPA is sufficiently connected to the object of the regulation to survive a facial challenge to the law's constitutionality. The Court is not deciding whether the jurisdictional element in this particular case has been satisfied, nor is it making a statement as to what showing will be required to meet that element.

[9] If we followed the reasoning of some courts, we could reject Defendants' establishment clause argument based on the earlier conclusion that the RLUIPA enforces the free exercise protections of the First Amendment. The mere fact that the RLUIPA, as applied through section (a)(2)(C), is an enforcement of free exercise rights logically prevents it from violating the establishment clause. To hold to the contrary would be stating that while in large part it would be unconstitutional to enact or implement certain zoning laws that burden religion, it would be equally unconstitutional to prohibit them. Congress would then be without any room to legislate between the two religion clauses. See Freedom Baptist Church, 204 F. Supp. 2d at 865 (stating that there is no need to subject the RLUIPA to the Lemon test because the action was a free exercise case not an establishment case). Nonetheless, in the interests of thoroughness, the Court will apply the Lemon test.

that the RLUIPA violates each of the three prongs of the applicable Establishment Clause test propounded in Lemon v. Kurtzman, 403 U.S. 602 (1971). The Plaintiffs counter by averring that the RLUIPA is a constitutional accommodation of religious belief. Siding with the majority of cases that have heard Establishment Clause challenges to the RLUIPA and the RFRA, the Court concludes that the RLUIPA passes the Lemon test and does not violate the Establishment Clause.

The goal of Establishment Clause jurisprudence is to ensure that the government does not "abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters." Amos, 483 U.S. at 335. To pass scrutiny under the Lemon test, "the statute must have a secular legislative purpose, . . . its principal or primary effect must be one that neither advances nor inhibits religion, . . . [and] the statute must not foster 'an excessive government entanglement with religion.'" Id. at 612-613 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). It is recognized that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144-45(1987). Accommodations of religious exercise may be broader than those

mandated by the Free Exercise Clause. Walz, 397 U.S. at 673.[10]

The majority of cases that have considered establishment clause challenges to the RLUIPA and the RFRA have determined that they are constitutional.[11] To date, four circuit courts of appeals have concluded that the RLUIPA does not violate the Establishment Clause. Midrash Sephardi, Inc. v. Town of Surfside, 2004 U.S. App. LEXIS 7706 (11th Cir. April 21, 2004); Madison v. Ritter, 355 F.3d 310 (4th Cir. 2003); Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003); Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002). Many district court opinions have similarly concluded that the RLUIPA passes the Lemon test. Charles v. Verhagen, 220 F. Supp. 2d 955 (W.D. Wis. 2002); Gerhardt v. Lazaroff, 221 F. Supp. 2d 827 (S.D. Ohio 2002);

---

[10]It is difficult to reconcile the secular purpose language of the Lemon test with accommodation statutes, which by their nature single out religion. It has been argued, and perhaps even supported by three justices of the Supreme Court, that the first two elements of the Lemon test should be combined for the purposes of accommodation cases, and that the inquiry should simply be whether the purpose behind the religious accommodation was "neither the advancement nor the inhibition of religion; . . . neither sponsorship nor hostility." Walz, 397 U.S. at 672; See Amos, 483 U.S. 327, 335; Texas Monthly, 489 U.S. 1, 40 (J. Scalia dissenting). It has not been unheard of for the Court to apply the Lemon test in a modified form. See, e.g., Agostini v. Felton, 521 U.S. 203, 222-23 (1997)(combining the effects and entanglement inquiry); County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989)(referring to the first two prongs of the Lemon Test as an "endorsement test"); Mitchell v. Helms, 530 U.S. 793, 829 (2000)(applying the "two" criteria from Agostini)(plurality). Nonetheless, without a clear statement from the Supreme Court that something other than the traditional Lemon test is controlling in this case, we will consider all three factors.

[11]Cases involving establishment clause challenges to the RFRA are as relevant as those involving the RLUIPA. The Defendants' arguments are identical to those made against the RFRA. If any distinction could be drawn, the challenges to the RFRA should be more persuasive since the RFRA had a much broader scope and, as stated before, increased the scrutiny applied to a vastly greater number of regulations from that which would be imposed by the Free Exercise Clause.

Johnson v. Martin, 223 F. Supp. 2d 820 (W.D. Mich. 2002); Williams v. Bitner, 285 F. Supp. 2d 593 (M.D. Pa. 2003); Westchester Day Sch. v. Village of Mamaroneck, 280 F. Supp. 2d 230 (S.D. N.Y. 2003); Murphy v. Zoning Com'n of Town of New Milford, 289 F. Supp. 2d 87 (D. Conn. 2003). In addition, all five circuits that have considered the question found that the RFRA did not violate the Establishment Clause. In re Young, 141 F.3d 854, 863 (8th Cir. 1998); Mockaitis v. Harcleroad, 104 F.3d 1522, 1530 (9th Cir. 1997); Sasnett v. Sullivan, 91 F.3d 1018, 1022 (7th Cir. 1996), vacated on other grounds, 521 U.S. 1114 (1997); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 470 (D.C. Cir. 1996); Flores v. City of Boerne, 73 F.3d 1352, 1364 (5th Cir. 1996), rev'd on other grounds, 521 U.S. 507 (1998). In contrast to these holdings, two district courts, whose decisions have been reversed, and one circuit court, have concluded that the portions of the RLUIPA applying to institutionalized persons are unconstitutional. Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003)(holding that the institutionalized persons provisions of the RLUIPA have the primary effect of advancing religion because they favor religious rights over other fundamental rights); Al Ghashiyah v. Department of Corrections of the State of Wisconsin, 250 F. Supp. 2d 566 (E.D. Wis. March 4, 2003)(finding the RLUIPA to violate the last two prongs of the Lemon test) rev'd by Charles v. Verhagen, 348 F.3d 601 (7th Cir.

2003); Madison v. Riter, 240 F. Supp. 2d 566 (W.D. Va. 2003)(finding that the RLUIPA has an impermissible effect of advancing religious rights), rev'd by 355 F.3d 310 (4th Cir. 2003). These cases follow Justice Stevens' concurrence in Boerne, which opined that the RFRA violated the Establishment Clause.[12] See Boerne v. Flores, 521 U.S. at 537.(Stevens, J., concurring). Despite the numerous cases in this area, neither the Third Circuit nor another Eastern District Judge has subjected the RLUIPA to the Lemon Test. After doing so, this Court finds, in accordance with the majority of courts, that it passes the test.

a. The RLUIPA Has a Secular Purpose

The RLUIPA has a legitimate secular purpose. The fact that an accommodation statute, such as the RLUIPA, mentions or even singles out religion does not prevent it from having a secular purpose. The government need not be "oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." Village of Kiryas Joel, 512 U.S. at 705. It is an acceptable stated purpose to act "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." Amos, 483 U.S. at 335. The RLUIPA has exactly that

[12]It has been pointed out that Justice Stevens' concurrence was not joined by any of the other eight justices. Freedom Baptist Church, 204 F. Supp. 2d at 864.

purpose.

b. The RLUIPA Does Not Have an Impermissible Effect on Religion

The RLUIPA does not have the primary effect of advancing religion merely because it benefits religion. Scores of statutes alleviate burdens on religious organizations, making it easier for those organizations to disseminate their message. In Amos, the Supreme Court stated that statutes that accommodate religion do not have an impermissible effect merely because they allow churches to advance religion. Id. at 337. If such were the case, every statute which attempted to alleviate a burden on religious institutions would be unconstitutional. Congress would be forbidden from ever relaxing burdens on churches without simultaneously benefitting nonreligious entities, such as non-profit institutions. The Supreme Court has already rejected this notion. Id. at 338("[W]e see no reason to require that the [burden-alleviating] exemption come packaged with benefits to secular entities.").

To run afoul of the second prong of the Lemon test, "it must be fair to say that the *government itself* has advanced religion through its own activities and influence." Amos, 483 US at 337. "[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of religion connoted a sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz, 397 U.S. at 668. The

RLUIPA, by its own terms, has done nothing to actively advance religion. All it has done is advance the ability of people to engage in the free exercise of their religious beliefs without unnecessary government burdens. This fact does not make it unconstitutional.

c. The RLUIPA Does Not Create Excessive Entanglement with Religion

The RLUIPA does not create excessive entanglement as argued by the Defendants. Accommodation statutes, such as the RLUIPA, actually effectuate a more complete separation of church and state. Williams, 2003 WL 22272302 at * 5 (citing Amos, 483 U.S. at 335). The Defendants' arguments that the RLUIPA forces local land use officials to become "expert in the needs and requirements of the religious landowners in the community," and that "oversight of theology and belief is antithetical to the Establishment Clause" miss their mark. First, it is always the duty of local land use officials to inquire into the proposed uses of landowners seeking permits and variances. This type of inquiry is inherent in the mandate of local land use authorities, not a byproduct of the RLUIPA. Further, the RLUIPA requires no more expertise in religious practices than does current First Amendment jurisprudence. Local officials, before RLUIPA, have had to determine whether their limitations would violate the Free Exercise Clause. If anything, Congress's elimination of any inquiry into whether a particular activity is a central tenet of

a religion will reduce entanglement between local land use boards and religious organizations. Contrary to the Defendants' claim that the RLUIPA compels municipal governments to consider "every potential religious objection to every land use law from the perspective of each religious believer," the RLUIPA only requires the ZHB to consider whether the reasons behind their decisions are the least restrictive means of achieving a compelling government interest. This determination is not entanglement because that decision turns purely on the government's secular motivation and means. It neither requires oversight of religious beliefs nor creates situations where the government could be accused of endorsing particular religious beliefs or religion in general.

4. The RLUIPA Does Not Violate the Tenth Amendment

The Defendants argue that the RLUIPA is unconstitutional because it violates the Tenth Amendment. The Tenth Amendment reserves to the states those powers neither delegated to the United States nor prohibited by the Constitution to the states. As the Court has already held that the passage of the RLUIPA is within Congress's express power to regulate interstate commerce, it does not violate the Amendment. See Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the states."). While the

Defendants may vehemently argue that land use is traditionally under local control, this does not put it beyond the reach of congressional authority when Congress acts within the confines of its constitutional powers.

C. It Is Unnecessary to Determine If Strict Scrutiny Has Been Met

Having found that the RLUIPA is constitutional and properly applies to this case, we need only briefly touch on the actual substance of the statute. Under the RLUIPA, a land use action can only place a substantial burden on the free exercise of religion if it "(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000cc(a)(1). Because the Defendants do not argue that the denial of the Plaintiffs' permit furthers a compelling government interest, the Court does not need to analyze whether strict scrutiny is satisfied at this time. The Court thus concludes that the Defendants' Motion for Summary Judgment as to Count XI must be denied.

D. Defendants' Did Not Move for Summary Judgment of the Other Potential Causes of Action under the RLUIPA Are Not Addressed

The Defendants do not argue for summary judgment on the Plaintiffs' claims under sections (b)(1) and (b)(3)(B) of RLUIPA, which form the bases for Counts X and XII of the Complaint.

Accordingly, the Court will not address these potential claims at this time, despite the fact that other holdings of this opinion may bear on their viability.

VI. Plaintiffs' Freedom of Speech and Assembly[13] Are Not Violated

The Defendants have moved to dismiss the Plaintiffs' claims that the Ordinance is unconstitutional because it violates freedom of speech and freedom of assembly rights under the United States and Pennsylvania Constitutions. The Defendants argue that the Ordinance is a permissible time place and manner regulation of expressive activity. The Plaintiffs argue that the Ordinance is both content- and viewpoint-based, that it is not supported by significant government interests, and that it does not leave open sufficient alternative channels for speech. They further argue that the Ordinance's application was based on hostility to the Plaintiffs' religious viewpoint. Because it is of a controlling significance, the Court will begin its analysis with the issue of content neutrality.

The Court finds that the Ordinance is a content-neutral time, place and manner restriction. At first glance, the Ordinance does not "appear to fit neatly into either the 'content-based' or the 'content-neutral' category." Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986). It defines a

[13]Generally freedom of speech and freedom of assembly cases are treated alike. New York State Club, Inc. v. City of New York, 487 U.S. 1, 13 (1988).

"Place of Worship" as "a tax-exempt institution that people regularly attend to participate in or hold religious services meetings, and other activities related to religious ceremonies." Case Exhibit J, 112. While this definition alludes to the nature of speech that occurs at the particular location, this does not automatically make the Ordinance content-based. The Supreme Court stated:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech."

Ward v. Rock against Racism, 491 U.S. 781, 791 (1989)(internal citations omitted). Generally, a regulation is neutral if it can be justified based on the secondary effects of certain speech, rather than the nature of the message. Renton v. Playtime Theatres, Inc., 447 U.S. at 48 (internal citations omitted).

Here, it is quite clear that the Township was motivated to limit the secondary effects of religious worship, rather than to suppress speech in the form of religious exercise. This fact is made evident by the Township's decision to allow places of worship in three zoning areas of the Township and the current

operation of more than twenty places of worship in residential areas as previous nonconforming uses. If the Township wanted to eliminate religious speech, it would not tolerate it at these locations. Instead, the decision to exclude places of worship is honestly motivated by the desire to separate intensity of uses, and a concern as to the effect that the traffic, noise, and crowds generated by places of worship may have on the peaceful enjoyment of residential neighborhoods.

The Court finds that the Ordinance is constitutional as a content-neutral time, place and manner restriction. The First Amendment requires that such restrictions be "narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). The Ordinance is aimed at a significant government interest: maintaining the peaceful enjoyment of residential property. Further, there are ample means for the Plaintiffs to communicate their message as they could locate elsewhere in the Township. See Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 765(7th Cir. 2003)(denying free speech and assembly challenges to an ordinance limiting the size of lots on which churches may locate because it was not motivated by disagreement with a particular message, but by a desire to promote harmonious and efficient land use). Accordingly, the Court holds that the

Plaintiffs' free expression and free assembly claims must be dismissed.[14]

VII. The Ordinance Does Not Violate Equal Protection Principles under the Fourteenth Amendment or the Pennsylvania Constitution

The Plaintiffs argue that the Ordinance violates Equal Protection both on its face, and as applied. They claim that the ordinance treats similarly situated uses differently without a rational basis. They further argue that the Ordinance was applied differently to similarly situated uses. Finally, they claim that summary judgment should be granted in their favor because a zoning ordinance that excludes places of worship from all residential areas is irrational.

Equal protection challenges to legislation or government action will be sustained "if the classification drawn by the statute is rationally related to a legitimate state interest." Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).[15] In its opinion reversing this Court's earlier grant of

[14]"The Pennsylvania Constitution provides essentially the same protection of expression as does the United States Constitution." Pap's A.M. v. City of Erie, 674 A.2d 338, 345 (Pa. Commw. Ct. 1996)(subsequent history omitted). Although the Plaintiffs allude to the fact that the Pennsylvania constitution's free expression protections are "at least" as strong as those under the federal constitution, they fail to elaborate. An independent search by this Court has not uncovered any reason why the secondary effects doctrine would not be equally applicable to the Plaintiffs' state constitutional claims. Accordingly, those challenges must be dismissed.

[15] The only exception to this rule is when the classification falls into the list of suspect classifications which have been deemed to be "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and

partial summary judgment, the Third Circuit held that "[t]he first inquiry a court must make in an equal protection challenge to a zoning ordinance is to examine whether the complaining party is similarly situated to other uses that are either permitted as of right, or by special permit, in a certain zone." Congregation Kol Ami v. Abington Twp., 309 F.3d 120, 137 (3d Cir. 2002). If two similarly situated uses are treated differently, a land use ordinances will be deemed "irrational" if the state interest used to justify the classification is illegitimate (an ends-focus) or the chosen classification is not rationally related to the interest (a means-focus).

The Plaintiffs are not similarly situated to uses permitted in R-1 districts. As the Third Circuit clarified in its reversal, similarly situated uses cannot be determined solely by reference to the impact of the uses. The comparators of "Place of Worship" offered by the Plaintiffs are "Country Club[s],"[16] which are permitted as an accessory use to "outdoor recreation" and allowed in R-1 districts by special exception, and "librar[ies]," which are considered to be municipal complexes permitted by special exception. These uses, however, are different from the Plaintiffs' proposed use, which will entail a

---

antipathy." Id. No party has argued that the Plaintiffs or "Places of Worship" in general are considered one of these suspect classifications.

[16]The "country club" permitted by the Ordinance may not have a restaurant. Nor may it include a golf course. Rather, the "country club" may be accessory to "miniature golf courses, swimming pools, tennis courts, ball fields, trails, and similar [outdoor] uses."

more intense use of land. It will involve large gatherings for services, bible study, and bar and bat mitzvoth. The gatherings permitted by the Ordinance, such as those at libraries, are likely to be much smaller, less frequent, and have fewer people coming and leaving at the same time than those at a “Place of Worship.” Moreover, because outdoor recreation clubs and libraries are open to all members of a residential neighborhood, they could have the effect of building a sense of community, unlike “Places of Worship,” which by their nature are only open to certain residents. Because they are not similarly situated uses, the Plaintiffs’ facial equal protection challenge must fail.

Turning to the Plaintiffs’ claim that the application of the Ordinance violates the Fourteenth Amendment through the denial of the Plaintiffs’ request for a variance and special exception, the Court finds that this claim must also be dismissed. Because the Plaintiffs have not shown that similarly situated uses have been granted variances or special exceptions, the Court cannot find that the Plaintiffs were treated unequally.

The Court rejects the Plaintiffs’ contention that the Ordinance is unconstitutional because it is irrational to exclude "Places of Worship” from all residential districts. While the Court’s earlier opinion alluded to the notion that a house of worship furthers the public welfare, the Third Circuit rejected

this as "seriously problematic." Kol Ami, 309 F.3d at 139. The Plaintiffs advocate for a rule that the exclusion of "Places of Worship" from all residential zoning areas is unconstitutional, yet consistent with the Third Circuit's opinion. Although it is possible to reconcile the Plaintiffs' proposed rule and the Third Circuit's opinion, doing so is not the most logical course of action. The Third Circuit made it clear that a municipality has the power to find that "Places of Worship" are incompatible with certain residential zoning districts. Id. at n. 5. If it is rational to exclude a use from one residential district because of certain effects it may have on surrounding property, then it must be rational to exclude such uses from all residential zoning districts, provided that "Places of Worship" are permitted to locate elsewhere in the Township.[17]

The Equal Protection Clause affords local governments wide latitude in handling matters of local control, and it has been held that they may adopt prohibitions that may be broader than necessary. See Village of Euclid v. Ambler Realty Company, 272 U.S. 365, 388-89 ("The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity."). While the positive effects of having a church located in a residential neighborhood may

[17]This is not to say that a Township may exclude "Places of Worship" from all areas of a municipality. This would inevitably raise serious constitutional questions and possibly give rise to an inference of animus toward religion.

outweigh the negatives, the Equal Protection Clause does not empower this Court to sit as an uber-zoning board; it is simply not the Court's cost-benefit analysis to make. While it may be improper to exclude "Places of Worship" from all residential districts, it is not necessarily irrational. Accordingly, the Plaintiffs' equal protection claims must be dismissed and their Motion for Summary Judgment on their facial challenge to the Ordinance must be denied.[18]

VIII. Due Process

A. Plaintiffs' Substantive Due Process Rights Were Not Violated

Based on prior discussion in this opinion, the Court may easily dispatch with the Plaintiffs' substantive due process claim. Unless a fundamental right is involved, substantive due process challenges will only muster rational basis scrutiny. The Court has already rejected the Plaintiffs' allegations of fundamental rights violations. Furthermore, the discussion above resolves any lingering doubts as to whether the Ordinance is rationally related to a legitimate government purpose; it is, and therefore, the substantive due process claim must be dismissed.

[18]"The equal protection provisions of the Pennsylvania Constitution are analyzed by this Court under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution." Love v. Borough of Stroudsburg, 597 A.2d 1137 (Pa. 1991). Accordingly, the Court need not include an independent analysis of the state law equal protection claims, and those claims must be dismissed for the same reasons stated above.

B. Plaintiffs' Procedural Due Process Rights Were Not Violated

To the extent the Plaintiffs' complaint also raises a procedural due process claim, that, too, may be easily dismissed. There has been no deprivation of due process because the Plaintiffs continue to be in the process of appealing the ZHB's decision via their cause of action under the Pennsylvania Municipalities Code, 53 P.S. 10101. To the extent the Plaintiffs raise a claim challenging the sufficiency of the appeal process of ZHB decisions, that claim is rejected.

IX. The Court Will Entertain the Plaintiffs' Claim under the Pennsylvania Municipalities Code

The Plaintiffs have included in their Complaint an appeal of the ZHB's decision pursuant to 53 P.S. § 11002-A. This section permits an appeal of adverse zoning decisions to the Court of Common Pleas of the county in which the zoned property exists, and the reversal of that decision if the zoning board abused its discretion or committed an error of law. The Defendants argue that the Court should dismiss all federal claims and decline to exercise jurisdiction over this cause of action under 8 U.S.C. § 1367 (c)(3). Because this Court has not dismissed all of the pending federal claims, this argument must fail. While the Court maintains some reservations as to whether

it should exercise jurisdiction over this claim, it will continue to entertain it for the time being, especially considering its relative insignificance compared to the other claims.

X. The Claims Against Defendant Matteo Are Redundant and Must Be` Dismissed

The Plaintiffs have unnecessarily sued Defendant Matteo under § 1983 in his official capacity as Director of Code Enforcement of Abington Township. When a government body can be sued for injunctive and declaratory relief, there is no need to bring official-capacity suits against local government officials. Kentucky v. Graham, 473 U.S. 159, 169 n. 14(1985). Because the Township is already a named party, the suit against Matteo in his official capacity is wholly redundant and the Court will dismiss him as a Defendant. See Saterfield v. Borough of Schuylkill Haven, 12 F.Supp.2d 423, 432 (E.D. Pa. 1998)(choosing to dismiss individual borough council members in their official capacities because the borough was a named defendant).

XI. There Is No Substantial Burden under the Pa-RFRA

The Court finds that this case does not fall within the purview of the Pa-RFRA. The Pa-RFRA, which is largely a clone of its federal counterpart, provides that state and local governments “shall [not] substantially burden the free exercise of religion without a compelling government interest.” 71 Pa.

Cons. Stat. Ann. 2403 §2(2). The act defines “substantially burden” as follows:

> "Substantially burden." An agency action which does any of the following:
> (1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs.
> (2) Significantly curtails a person's ability to express adherence to the person's religious faith.
> (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion.
> (4) Compels conduct or expression which violates a specific tenet of a person's religious faith.

The ZHB’s denial of the Plaintiffs’ request for a variance and the Ordinance’s prohibition against “Places of Worship” in residential areas do not fall under any of these provisions. As stated earlier, locating in a residential area is not a fundamental tenet of the Plaintiffs’ religion. While meeting together for religious worship is essential to the Plaintiffs, there exist other areas in the Township in which the Plaintiffs could locate. The fact that the Plaintiffs are forced to locate in non-residential areas of the Township does not significantly curtail their ability to express adherence to their faith, nor does it deny the Plaintiffs a reasonable opportunity to worship. Accordingly, because there is no substantial burden under the Pa-RFRA, Count XIV of the Plaintiffs’ complaint must be dismissed.

XII. Conclusion

For the above stated reasons, the Defendants’ Motion for

Summary Judgment will be granted in part and denied in part. The Plaintiffs' renewed Motion for Summary Judgment will be denied, the Defendants' Motion to Dismiss Count XIV of the Amended Complaint will be denied and the Defendants' Motion for Summary Judgment on Count XIV of the Amended Complaint will be granted. An appropriate Order follows.

_____
Clarence C. Newcomer, S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONGREGATION KOL AMI and RABBI ELLIOT HOLIN, Plaintiffs,	:	CIVIL ACTION
v.	:	
ABINGTON TOWNSHIP; BOARD OF COMMISSIONERS OF ABINGTON TOWNSHIP; THE ZONING HEARING BOARD OF ABINGTON TOWNSHIP; and LAWRENCE T. MATTEO, JR., Defendants.	:	NO. 01-1919

O R D E R

AND NOW, this day of August, 2004, upon consideration of the Defendants' Motion for Summary Judgment; the Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, as to Count XIV of the Plaintiffs' Complaint; the Plaintiffs' Renewed Motion for Partial Summary Judgment, the Parties' responses, reply briefs and notices of supplemental authority, and in accordance with the preceding Opinion of the Court the following is hereby ORDERED:

1) The Defendants' Motion for Summary Judgment is DENIED in PART and GRANTED in PART; Counts I, III, IV, V, VI, VII, VIII, and IX of the Plaintiffs' Amended Complaint are DISMISSED;

2) The Defendants' Motion for Summary Judgment as to Count XIV of the Plaintiffs' Complaint is GRANTED; Count XIV of the Plaintiffs' Amended Complaint is DISMISSED;

3) The Defendants' Alternative Motion to Dismiss as to Count XIV of the Plaintiffs' Complaint is DENIED as MOOT; and,

4) The Plaintiffs' Renewed Motion for Partial Summary Judgment is DENIED.

AND IT IS SO ORDERED

_____

Clarence C. Newcomer, S.J.